STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 12, 2005
v	No. 251113 Wayne Circuit Court
RODNEY LAZARA SCOTT, Defendant-Appellant.	LC No. 02-006183-01

Before: Gage, P.J., and Cavanagh and Griffin, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for possession of over 650 grams of narcotics, MCL 333.7403(2)(a)(1). Defendant was sentenced to twenty to sixty years' imprisonment. We affirm.

I

Defendant first argues that the trial court erred in denying his motion to suppress his statement. We disagree. In regard to a suppression issue, we review the trial court's factual findings for clear error. To the extent that a trial court's ruling on a motion to suppress involves an interpretation of the law or the application of a constitutional standard to uncontested facts, our review is de novo. *People v Attebury*, 463 Mich 662, 668; 624 NW2d 912 (2001).

In regard to a custodial interrogation, a statement of an accused is inadmissible unless the accused voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 694 (1966); *People v Abraham*, 234 Mich App 640, 644; 599 NW2d 736 (1999). The burden is on the prosecutor to establish a valid waiver by a preponderance of the evidence. *Abraham*, *supra* at 645.

When a defendant challenges the admissibility of his statements, the trial court, outside the presence of a jury, must hear testimony regarding the circumstances of the defendant's statement. *People v Walker*, 374 Mich 331, 338; 132 NW2d 87 (1965); *People v Manning*, 243 Mich App 615, 624-625; 624 NW2d 746 (2000). Whether the defendant's statement was knowing, intelligent, and voluntary is a question of law that the court must examine under the totality of the circumstances. *People v Cheatham*, 453 Mich 1, 27 (Boyle, J.), 44 (Weaver, J.); 551 NW2d 355 (1996); *People v Snider*, 239 Mich App 393, 416; 608 NW2d 502 (2000). Whether a statement was voluntary is determined by examining police conduct. *People v*

Howard, 226 Mich App 528, 538; 575 NW2d 16 (1997). Voluntariness is also determined by examining the totality of the circumstances surrounding a statement to establish if it was the product of an essentially free and unconstrained decision by its maker. *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988). The list of factors to consider includes:

> the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*Id*. at 334.]

On the issue of voluntariness, an absence or presence of any one factor is not conclusive. *Id*. at 333-334. "The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made." *Id*.

Here, defendant challenged the admission of his statement into evidence, arguing that the statement was not voluntary, and the trial court examined the admissibility of defendant's confession at a *Walker* hearing.

In this case, there are two separate versions of events. The police and United States Customs officials testified that defendant was not handcuffed when he was interrogated. He was read his *Miranda* rights and was not promised anything, coerced, or threatened into giving a statement. According to the police, defendant appeared to be in good health, and there was no indication that he was under the influence of narcotics or alcohol, or otherwise ill. Defendant was asked if he had any medical conditions; he stated that he was on dialysis but that he felt fine. He was allowed to use the restroom upon request, and the police were not aware that defendant may have soiled himself. Defendant gave a brief synopsis of his version of events, and police had him write out a statement. Defendant never asked for an attorney and finished the statement in thirty to forty minutes. Additional questions and answers were written out by police and signed by defendant. During the course of the interrogation, defendant never indicated that he wanted to stop talking.

Defendant's version of events differed from that of the authorities. Defendant testified that he had kidney failure due to diabetes and had not done dialysis the whole day prior to his arrest. Defendant stated that, as a result, his stomach hurt, and he was bloated from poisons building up in his body. Defendant testified that his body was tensing up, and he was having trouble breathing during the interview. Defendant stated that when he was arrested he asked for a lawyer, but did not receive one. Defendant stated that the agents read his *Miranda* rights to him and that he signed a form acknowledging those rights, but indicated that he did not want to make a statement and reiterated his desire for an attorney. Defendant claimed that he was not allowed to use the restroom when he asked, and, consequently, he soiled himself. Defendant stated that he signed the statement because he was tired and wanted medical treatment. After

defendant was taken to the Taylor Police Station and booked, he was taken to the hospital. The hospital took blood from defendant, and then released him to seek his own treatment at the jail.

Following the *Walker* hearing, the trial court stated that, after weighing the officers' testimony against defendant's testimony, the statements of the officers were more credible. The trial court noted that it was curious that the hospital would release defendant and let him medicate himself, if, in fact, defendant was in dire need of medical attention. The trial court found that the statement by defendant was voluntary and was not coerced, and defendant was not denied medical treatment. The trial court therefore denied defendant's motion to suppress the statement.

Where, as in the instant case, the resolution of a disputed factual question turns on the credibility of witnesses, this Court will defer to the trial court, which had a superior opportunity to evaluate these matters. *People v Daoud*, 462 Mich 621, 629; 614 NW2d 152 (2000); *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). The trial court believed the testimony of the police officers and customs agents over the testimony of defendant. Thus, the trial court found that defendant voluntarily waived his *Miranda* rights. We conclude that the trial court did not err in denying defendant's motion to suppress his confession. According to the authorities' version of events, during the course of the interview, the police treated defendant fairly and did not engage in coercive behavior. Examining the circumstances, defendant was not promised anything, coerced, or threatened into giving a statement. He was advised of his constitutional rights multiple times. Defendant did not appear intoxicated or drugged. The police asked defendant about his health, and defendant stated that he was on dialysis, but he felt fine. Defendant was allowed to use the restroom when he asked. According to the credible version of events given by the police and customs agents, the facts, when viewed in their entirety, do not show police coercion that would negate the voluntary nature of defendant's confession. *Cipriano, supra* at 333-334.

II

Next, defendant argues that defense counsel was ineffective by opening the door to other acts testimony when he asked defendant about his history of drug sales. We disagree. Defendant has not properly preserved this issue for review by moving for either a new trial or a *Ginther*[1] hearing. *People v Sabin*, 242 Mich App 656, 658; 620 NW2d 19 (2000). Therefore, this Court's review is limited to mistakes apparent on the record. *Id*. at 658-659.

A trial court's findings of fact are reviewed for clear error, while questions of constitutional law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To establish an ineffective assistance of counsel claim, a defendant must show that the counsel's performance failed to meet an objective standard of reasonableness and that the deficient performance so prejudiced the defendant that it deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Effective assistance of counsel is

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

presumed, and the defendant assumes a heavy burden of proving otherwise. *LeBlanc*, *supra* at 578.

To establish a claim of ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000), and (3) that the resultant proceedings were fundamentally unfair or unreliable, *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Effective assistance of counsel is presumed, and the defendant assumes a heavy burden of proving otherwise. *LeBlanc*, *supra* at 578.

Defendant claims that counsel was ineffective by opening the door to other acts evidence. MRE 404(b) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Use of other acts as evidence of character is excluded, except as allowed by MRE 404(b), to avoid the danger of conviction based on a defendant's history of misconduct. *People v Starr*, 457 Mich 490, 495; 577 NW2d 673 (1998). To be admissible under MRE 404(b)(1), other acts evidence must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *People v Knox*, 469 Mich 502, 510; 674 NW2d 366 (2004); *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). The list of exceptions in MRE 404(b) is nonexclusive. *People v Sabin (After Remand)*, 463 Mich 43, 56; 614 NW2d 888 (2000).

In this case, Eric Clay, defendant's cousin and co-defendant, testified that defendant had been in Milwaukee selling drugs with him. During his direct examination, defense counsel asked defendant, "Have you ever sold drugs in Milwaukee?" and defendant replied, "No." During the prosecutor's cross-examination of defendant, the following exchange occurred:

Q. And, of course, you've never sold cocaine before?

A. Excuse me, sir?

Q. You've never sold cocaine before; correct?

A. (No verbal response.)

Defense counsel objected, and a side bar was held, after which testimony continued:

Q. You've never sold cocaine before, have you, sir?

A. From the year of '91 through '94, sir.

Defendant argues that defense counsel was ineffective for opening the door for the admission of the other acts evidence of defendant's selling of cocaine when counsel asked if defendant sold cocaine in Milwaukee with Clay. When logically relevant, our Supreme Court has stated that other acts evidence is admissible as a proper purpose to rebut a charge of implied fabrication. *Starr, supra* at 501-502. The question whether defendant sold cocaine in Milwaukee with Clay opened the door to evidence regarding defendant's past drug sales at any time. Therefore, the evidence of defendant's prior sales of cocaine from 1991 to 1994 was proper after defense counsel opened the door.

However, defendant has failed to overcome the presumption that he received effective assistance of counsel at trial, even though defense counsel opened the door into inquiry regarding defendant's history of drug sales. A defendant claiming ineffective assistance of counsel must overcome a strong presumption that counsel's tactics were matters of sound trial strategy. *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999). Defense counsel's decision to question defendant about his past cocaine sales with Clay was trial strategy in light of Clay's testimony that defendant was a major drug kingpin in Milwaukee. Further, there is no reasonable probability that, but for counsel's error, the result of the proceedings would have been different. Defendant's statement to officers admitting his guilt was offered into evidence. Defendant's written statement indicated that "Vic" asked him to purchase cocaine in Jamaica and gave defendant $9,500 to purchase it. Defendant stated that he gave the money to Clay, who then purchased the cocaine. Defendant stated he was given $3,000 to bring the cocaine back.

Testimony by Clay and Nichole Joseph, who had gone on the Jamaica trip with defendant, indicated that defendant gave envelopes containing money to a man in Jamaica. Clay and Joseph also testified that defendant called Keyanna Seaberry, defendant's cousin and fellow travel mate on this trip, and told her that a man would meet her outside the hotel to give her a souvenir. The man gave her placemats that contained cocaine. Therefore, because the evidence against defendant was so strong, there is no indication that, had defense counsel not opened the door to testimony regarding defendant's prior history of selling drugs, the result of the proceedings would have been different. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

III

Next, defendant argues that he was denied a fair trial when the prosecution did not produce Seaberry as a witness at trial. We disagree. Statutory interpretation is a question of law that is reviewed de novo on appeal. *People v Phillips*, 469 Mich 390, 394-395; 666 NW2d 657 (2003).

Under MCL 767.40a(3), a prosecutor is required to send a witness list to defense counsel not less than thirty days before the trial. Under MCL 767.40a(4), a prosecutor is permitted to add or delete from the list of trial witnesses at any time, "'upon leave of the court and for good

cause shown or by stipulation of the parties.'" *People v Perez*, 469 Mich 415, 420; 670 NW2d 655 (2003). When the statute is violated, the defendant must show prejudice from the violation before he is entitled to relief. *People v Hana*, 447 Mich 325, 385 n 10; 524 NW2d 682 (1994).

The statute indicates that the prosecutor must give advance notice of all known res gestae witnesses and specify before trial which known witnesses it intends to call. *People v Burwick*, 450 Mich 281, 290-291; 537 NW2d 813 (1995). After advising the defendant of all known witnesses, and who among those witnesses the prosecutor will produce at trial, the defense must determine which known witnesses the prosecutor will not call and, upon request, the government must provide reasonable assistance "as may be necessary to locate and serve process . . . ." MCL 767.40(a)(5); *Burwick*, *supra* at 290-291.

In this case, Seaberry was marked as "and/or" and considered an alternate witness to Joseph. Joseph was called to testify, and the prosecutor did not call Seaberry. Although the statute does not explicitly state that a witness can be marked as an alternate witness, it is common practice for prosecutors to do so. The trial court stated:

> Because it's marked, and we do it all the time, either/or, and it's all the time. And it clearly indicates that they're going to call Keyanna Seaberry or Nicole [sic] Joseph; one or the other.

Further, defense counsel was on notice that Seaberry might not be produced and could have asked for reasonable assistance to produce her. *Burwick*, *supra* at 290-291. The trial court correctly determined that the statute allows witnesses to be marked as alternates and that the prosecution did not need to produce Seaberry.

IV

Defendant, proceeding in propria persona, argues that the trial court lacked jurisdiction because the complaint against him was defective. We disagree. This Court must determine whether there was error that was harmless beyond a reasonable doubt. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

Defendant claims that the complaint should be quashed on the grounds that it did not set forth probable cause, reciting only the elements charged, and that the officer did not rely on personal information in executing the complaint. However, the complaint contained the substance of the accusations against defendant and the name and statutory citation to the charged offenses, which is all that is required. MCL 764.1d; MCR 6.101(A). MCL 764.1d reads:

> A complaint shall recite the substance of the accusation against the accused. The complaint may contain factual allegations establishing reasonable cause.

Facts that establish probable cause do not need to be set forth in the complaint; a finding of probable cause may be based on extrinsic evidence presented to the magistrate. MCL 764.1a(2); MCL 764.1d; MCR 6.102(B). The complaint in this case contained the substance of the accusation against defendant. Also, the absence of personal knowledge of the complaining officer is not necessary if the officer's testimony comes from information and belief. MCL

764.1a(3). Here, because the officer was involved in the arrest and interrogation of defendant, he had information and belief about the charges against defendant.

V

Defendant also argues that his conviction and sentence was unconstitutional, and he should be discharged from custody because a prompt judicial determination was not held within forty-eight hours of his arrest. We disagree. This Court must determine whether there was error that was harmless beyond a reasonable doubt. *Carines, supra* at 774.

An arrested person must be taken before a court for arraignment without unnecessary delay. MCR 6.104(A). A delay of more than forty-eight hours between arrest and arraignment is presumed to be unreasonable, and the prosecution has the burden to demonstrate that extraordinary circumstances necessitated the delay in order to introduce evidence gained during that time. *Manning, supra* at 628. In this case, there was no evidence that was used against defendant at trial that was gathered between the arrest and the arraignment three days later. Because there was no evidence gathered during the delay and used against defendant at trial, there is no remedy for defendant with regard to the claimed violation of his right to a prompt judicial determination of cause. The error was harmless beyond a reasonable doubt. Defendant is not entitled to dismissal because of the procedural violation.

VI

Defendant next argues that the prosecutor engaged in misconduct by shifting the burden of proof and vouching for the credibility of the police witnesses. To preserve the issue for appellate review, defendant must timely and specifically object to the prosecutor's improper conduct. *People v McLaughlin*, 258 Mich App 635, 644-645; 672 NW2d 860 (2003). Defendant did not object to the prosecutor's alleged vouching for the credibility of the witnesses; therefore, that portion of the issue is not preserved for appeal and is reviewed for plain error affecting defendant's substantial rights. *People v Schutte*, 240 Mich App 713; 613 NW2d 370 (2000), abrogated in part on other grounds by *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), citing *Carines, supra* at 761-762. If a curative instruction could have alleviated any prejudicial effect, the appellate court will not find error requiring reversal. *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003).

Preserved issues of prosecutorial misconduct are reviewed de novo to determine whether the challenged remarks denied defendant a fair and impartial trial. *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004); *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). The Court must examine the pertinent portion of the lower court record and evaluate the prosecutor's comments in context to determine whether it was more probable than not that a miscarriage of justice occurred. *Carines, supra* at 774. A prosecutor may not comment on a defendant's failure to present evidence or testify. *People v Reid*, 233 Mich App 457, 477-478; 592 NW2d 767 (1999). More specifically, the prosecutor may not attempt to shift the burden of proof. *Id.* A prosecutor may not imply that a defendant must prove something or present a reasonable explanation because this, too, shifts the burden of proof. *People v Guenther*, 188 Mich App 174, 180; 469 NW2d 59 (1991). It is permissible for a prosecutor to observe that evidence against a defendant is undisputed, and, despite the fact that a defendant has no burden to produce any evidence, once he advances a theory, argument regarding the inferences created

does not shift the burden of proof. *People v Godbold*, 230 Mich App 508, 521; 585 NW2d 13 (1998).

Here, defendant claims that the prosecutor shifted the burden of proof by arguing that defendant did not present evidence regarding the legitimacy of his music business. It was defendant's contention that he was going to Jamaica on business related to his music. The prosecutor's comments were allowed to establish that defendant was not being truthful in his testimony because defense counsel argued that defendant's trips were business trips. The prosecutor was free to argue that the evidence that they were not business trips had not been disputed by testimony. Because the prosecutor was merely pointing out the weaknesses in defendant's argument, he did not improperly shift the burden of proof to defendant. *People v Fields*, 450 Mich 94, 112; 538 NW2d 356 (1995). Further, the trial court instructed the jury that the prosecution must prove each element of the crime beyond a reasonable doubt, and that defendant was not required to prove his innocence.

Defendant also argues that the prosecutor vouched for the credibility of the prosecution's police witnesses. A prosecutor is not permitted to vouch for the credibility of a witness indicating that he has some special knowledge that the witnesses are testifying truthfully. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995); *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). Here, the record indicates that the prosecutor did not vouch for the credibility of the police witnesses by asking the jury to examine the motive behind the police testimony; rather, the prosecutor argued the police officer lacked a motive for lying. Moreover, with respect to all of the arguments regarding prosecutorial misconduct, any prejudicial effect could have been cured by a cautionary instruction that the prosecutor's comments should be disregarded. *Ackerman, supra* at 448-449.

VII

Defendant next argues that evidence of Clay's and Joseph's prior plea agreements was improperly admitted. We disagree. To properly preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001); MRE 103(a)(1). Defense counsel did not object to the nature of the questioning or to the testimony by witnesses regarding their plea bargains; thus, the issue is not properly preserved for review. Because defendant failed to object to the admission of the evidence at trial, it is reviewed for plain error that affected his substantial rights. *Carines, supra* at 763-764.

In general, "[a]ll relevant evidence is admissible[.]" MRE 402. Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403; *Sabin, supra* at 58. "Unfair prejudice" does not mean "damaging." *People v Mills*, 450 Mich 61, 75; 537 NW2d 909, modified 450 Mich 1212 (1995). Any relevant evidence will be damaging to some extent. Rather, unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence. *Mills, supra* at 75-76; *People v McGuffey*, 251 Mich App 155, 163; 649 NW2d 801 (2002). Therefore, this Court must determine whether the evidence of Clay's and Joseph's pleas is unfairly prejudicial.

The Michigan Supreme Court has previously ruled that evidence of an accomplice's conviction by trial is unfairly prejudicial. *People v Lytal*, 415 Mich 603, 612; 329 NW2d 738 (1982). This Court, however, adopted the reasoning of the plurality in *People v Standifer*, 425 Mich 543; 390 NW2d 632 (1986), and has made a key distinction, holding that a prosecutor may question an accomplice about a guilty plea and a plea agreement, but not a guilty conviction by trial. *People v Dowdy*, 211 Mich App 562, 571; 536 NW2d 794 (1995). This Court reasoned that when a defendant does not object to the introduction of a plea agreement and uses its admission to question the credibility of a witness, "[w]e will not allow a defendant to use the plea information to undermine the accomplice's credibility at trial, and then allow him to argue on appeal that introduction of the evidence of the plea was prejudicial." *Id*. at 572. Similarly, defense counsel in the instant case failed to object to admission of the evidence of Clay's and Joseph's plea agreements, and defense counsel then used the evidence to attack their credibility during closing argument. Defendant may not use the plea agreements to argue witness credibility, and then argue on appeal that the evidence was unduly prejudicial. *Dowdy, supra* at 571.

Affirmed.

/s/ Hilda R. Gage
/s/ Mark J. Cavanagh
/s/ Richard Allen Griffin